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In the Supreme Court of the United States

October Term, 1980

SAVARE DE FELICE
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES E. LUGENBUHL
VANCE E. ELLEFSON
Lugenbuhl, Larzelere & Ellefson
600 Carondelet Street
Suite 602, Central Plaza
New Orleans, La. 70130
Telephone (504) 523-6066
Attorney for Savare DeFelice

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED:

The United States of America brought suit under 33 U.S.C. §§401, 403 (§§ 9 and 10 of the Rivers and Harbors Act of 1899) and 33 U.S.C. §§1311(a), 1344(a) (§§301(a), 404(a) of the Federal Water Pollution Control Act seeking an injunction ordering petitioner, Savare DeFelice, to remove sand and other fill materials which he had placed in the Cheniere Traverse Canal, a man-made waterway, in an attempt to restore access to his property, in accordance with the final judgment of the Court of Appeal, Fourth Circuit, State of Louisiana (a copy of which is contained, *infra*, in Appendix C, pages 26 through 29).

The question thereby arising is:

DOES THE CORPS OF ENGINEERS HAVE JURISDICTION UNDER EITHER THE RIVERS AND HARBORS ACT OR THE FEDERAL WATER POLLUTION CONTROL ACT TO REQUIRE A PERMIT, OR DENY PETITIONER THE RIGHT, TO REPLACE A WRONGFULLY REMOVED DAM, ACROSS A MAN-MADE CANAL, WHICH DAM PROVIDES PETITION-ER'S ONLY ACCESS TO HIS PROPERTY AND WHICH WAS BEING REPLACED IN ACCORDANCE WITH THE FINAL JUDGMENT OF A STATE COURT AND, IF THE CORPS HAS SUCH JURISDICTION DID IT ACT ARBITRARILY AND CAPRICIOUSLY IN THE EXERCISE OF THAT JURISDICTION?

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In the
SUPREME COURT
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VERSUS

SAVARE DE FELICE
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PETITION FOR WRIT OF CERTIOARI
TO THE COURT OF APPEALS,
FIFTH CIRCUIT

The Petitioner, Savare DeFelice, prays that a Writ of Certiorari be issued to review the opinion and judgment of the Court of Appeals, Fifth Circuit rendered in these proceedings on April 9, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 641 F. 2d. 1169, appears at Appendix A, *infra*, pages 1 through 17. The opinion of the United States District Court for the Eastern District of Louisiana, unreported, appears at Appendix B, *infra*, pages 18 through 25.

JURISDICTION

The judgment of the Court of Appeals, Fifth Circuit, was entered on April 9, 1981. See Appendix A, page 1, *infra*. This petition for certiorari was filed less than ninety days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

In 1944, the DeFelice family purchased property in Plaquemines Parish, Louisiana. (Transcript, hereinafter Tr. p. 188, 226-referring to the Transcript on Appeal to the Fifth Circuit). Because the land was accessible only through adjacent property owned by

Citrus Lands of Louisiana, the purchase agreement included a right of access through Citrus Lands' property to a shell surfaced roadway atop a dam which crossed a man-made drainage canal — commonly known as the Cheniere Traverse Canal (West Canal). (Tr. p. 189, 226-27, 233, 236-37; Defendant's Ex. 1-16).

The lands through which the DeFelice family had access to their property were subsequently sold to a private individual in 1959 by Citrus Lands of Louisiana. Subsequently, the adjacent landowner made an offer to purchase the DeFelice property, which offer was refused. A gate was then placed across the right of way which left the property inaccessiable except by water. (Tr. p. 189, 238). Until the destruction of the dam, the canal was not navigable "in-fact" due to the existence of the dam. Even subsequent to the destruction of the dam, during the winter months the canal is navigable only by small canoes or pirogues (Tr. p. 237-40).

As early as 1959 or 1960, the adjacent landowner had begun leasing "campsites" on his property. Shortly after the DeFelice family was denied access to its property by the adjacent landowner, unknown persons started cutting away at the dam across the canal,

by which the DeFelice family had gained access to its property, until it was completely destroyed by late 1965 or early 1966. (Tr. p. 237). Subsequent to that time navigation of the full length of the canal became possible.

The DeFelice family attempted to negotiate with the adjacent landowner to obtain removal of the gate blocking access to their property. When the negotiations failed, suit was filed, in 1974, which resulted in the decision reported in *DeFelice Land Corporation vs. Citrus Lands of Louisiana*, 330 So. 2d. 631 (La. App. 4th Cir. 1976), granting the DeFelice family right of access to and egress from the property at the point it had previously been exercised under the original agreement. (Tr. p. 189-91, 226-29). Pursuant to this judgment, an order was entered by the District Court for a survey to establish the metes and bounds of the original right-of-way. (Def. Ex. No. 20).

In July, 1977, in recognition of the legally established right of passage, Mr. Savare DeFelice, on behalf of the family, began to reconstruct the dam by placing fill material in the canal to reconstruct the dam in the manner in which it was originally built. (Tr. p. 190-93). On July 17, 1977, an investigator of the

Corps of Engineers appeared at the proposed canal crossing and ordered the work stopped. A Cease and Desist Order was sent to Mr. DeFelice by certified mail alleging he was in violation of 33 U.S.C. §§ 401, 403, and 33 U.S.C. §§1311(a), 1344(a), for failing to obtain dam construction and pollutent discharge permits.

After inviting Mr. DeFelice to provide an explanation as to his actions, but before the expiration of the time period granted for such a reply and prior to receiving a reply from Mr. DeFelice, the Corps informed Mr. DeFelice that he was to remove all construction begun in the canal and that he need not attempt to apply for a permit to cross the canal, as the Corps did not deem it in the "public interest" to grant such a permit. (Government Ex. No. 3, No. 12; Tr. p. 183-84). The Corps subsequently initiated litigation against Mr. DeFelice seeking an injunction and order to remove the material placed in the canal. A counterclaim for the value of the property taken by the Corps of Engineers was filed in the District Court. The District Court ordered a separate trial for the counterclaim, which is still pending. The District Court held

the actions of the Corps of Engineers reasonable and proper and within their authority and that decision was affirmed by the Court of Appeals, Fifth Circuit. Mr. DeFelice applies to this Court for a writ of certiorari.

REASON FOR GRANTING THE WRIT:

THE CORPS OF ENGINEERS DOES NOT HAVE JURISDICTION UNDER EITHER THE RIVERS & HARBORS ACT OR THE FWPCA TO REQUIRE A PERMIT, OR DENY PETITIONER THE RIGHT TO REPLACE A WRONGFULLY REMOVED DAM ACROSS A MAN-MADE CANAL, WHICH DAM PROVIDES PETITIONER'S ONLY ACCESS TO HIS PROPERTY AND WHICH WAS BEING REPLACED IN ACCORDANCE WITH THE FINAL JUDGMENT OF A STATE COURT AND, IF THE CORPS HAS SUCH JURISDICTION, IT ACTED ARBITRARILY IN THE EXERCISE OF THAT JURISDICTION.

The Canal in question, the Cheniere Traverse Canal, is a man-made drainage canal (641 F. 2nd 1170). Prior to the denial of the DeFelice family's right of access to their property by blocking the road providing access to the property, and the unauthorized removal of the dam, the canal, in effect, consisted of two canals, each of which began on either side of the dam

and proceeded in different directions, through a series of natural and man-made canals, ultimately connecting to Barataria Bay and the Gulf of Mexico (See F.N. 12. 641 F. 2d. 1169).

The earliest known map showing the existence of the canal, shows the dam in place across the canal (See Defendant's Ex. No. 17). The Fifth Circuit found the Corps had jurisdiction, and the Corps had properly interpreted its regulations as set out in 33 C.F.R. §§329.3, 329.4, 329.5, 329.8. The real issues in that regard are, however, (1)whether, prior to the destruction of the dam the Corps jurisdiction extended to the dam itself and not simply to the waters on each side; and (2) whether the removal of the dam, even though improper and a wrongful act, automatically extended Corps' jurisdiction to the area formerly occupied by the dam?

The key point, and the point ignored by both the District Court and the Court of Appeal, was that, prior to the removal of the dam, while the waters on either side of the dam were affected by the ebb and flow of the tide, the nature and construction of the canal and dam were such that the canal was not

navigable in fact (641 F. 2d. 1174-75). The Fifth Circuit's decision is built on a faulty foundation. The Court of Appeal, the District Court and the Corps of Engineers all ignored the sequence of events leading to the rebuilding of the dam. As shown by the record, these were: (1) Denial of access to the dam and the property beyond; (2) Wrongful removal of the dam; (3) Subsequent navigability "in fact" of the canal; and, (4) Timely legal action, in the proper jurisdiction, to obtain access to the dam and property beyond.

Whether the property in question was the subject of a general grant to the State of Lousiana and subsequent sale to private parties (See: 43 U.S.C. §982) or subject to prior ownership by way of land grant, there is no evidence in the record to suggest that the canal is not private property. In fact, the record clearly shows continuous acts by the owners to maintain the private status of the waterway (Tr. p. 215).

This Court has recently rendered two decisions touching on and applicable to this case. See: *Kaiser Aetna v. U.S.*, U.S. , 100 S. Ct. 383(1979);

Vaughn v. Vermillion Corp., U.S. , 100 S. Ct. 399 (1979).

As found by the District Court, the Court of Appeals, and as clearly evidenced by the record, in this case, Petitioner's only access, other than by water, to his property was by way of the wrongfully removed dam. Following the wrongful removal of the dam and blocking of access to petitioner's property, the DeFelice family entered into a good faith attempt to amicably resolve their difficulties with the adjacent landowner. When attempts to amicably resolve the problem failed, petitioners undertook legal action in a court of proper jurisdiction (The Louisiana State courts), in a timely manner under Louisiana law, ultimately resolving the matter in their favor in a judgment of the Fourth Circuit Court of Appeal, which became final before petitoners began rebuilding their access to their property. (Tr. p. 189-91, 226-29; Appendix C).

We suggest that the alternative with which petitioners were faced at the time they were barred from access to their property and the dam which was their

only access to their property was wrongfully removed, was an alternative abhored by the law — self-help. The result of the decision of the District Court and the Fifth Circuit is that, even though petitioners actions were undertaken in a timely manner under the laws of the State of Louisiana, petitioners erred in attempting to amicably resolve their problem and then resorting to a court of law for redress. Had petitioners engaged in self-help by knocking down the gate which blocked their access to their property and entering on to the land of the adjacent landowner with trucks, bulldozers and the other equipment necessary to rebuild the dam (within a period of time unspecified by either Corps of Engineers regulation, the District Court decision or the decision of the Fifth Circuit), only then could they have conformed to the law as espoused by the Corps of Engineers, District Court and Court of Appeals. While the question of the "taking" of petitioners' property has been severed and is yet to be tried, there can be no question under the present circumstances of this litigation that the value of petitioners' land, when only accessible by water and only then by way of small boat, has been substantially reduced. Under these circumstances, if this Court allows the decision

of the Fifth Circuit to stand, *Kaiser Aetna* must apply.

However, the companion case to *Kaiser Aetna*, *Vaughn v. Vermilion Corp.*, ____U.S.____, 100 S. Ct. 399(1979) offers this Court the opportunity to both avoid the inequities involved in the actions of the Corps of Engineers and the decisions of the District Court and Fifth Circuit, and obviate the necessity of reaching the question of "taking" of property. *Vaughn* is closely related to the case at bar, both by way of locale and by way of fact. At question in both cases are canals subject to tidal fluctuations which are navigable in fact (although in the case at bar, navigavibility in fact does not result from a voluntary act on the part of the landowner). The canal system ultimately enteres other natural navigable waterways, endng in the Gulf of Mexico. The canals are used for fishing and hunting and commercial activity (although in the case at bar, the so-called "commercial activity" involved is substantially less than in *Vaughn*). In *Vaughn*, this Court was presented with two issues. First, when a private citizen, on privately held real property, and with private funds creates a

system of artificial navigable waterways, in part by means of diversion or destruction of pre-existing natural navigable waterways, does the artifically developed waterway system become part of the "navigable waterways of the United States" and subject to the use of all citizens? Second, whether channels built on private property and with private funds, in such a manner that they ultimately joint with other navigable waterways were similarly open to use by all citizens of the United States.

The second issue was answered by this Court's opinion in *Kaiser Aeta.* This Court held the Louisiana Court of Appeal " . . . was correct in determining that on such facts *no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the commerce clause of Article I. of the United States Constitution*". (100 Su. Ct. 401; Emphasis added). The witnesses and complainants relied upon by the Corps of Engineers in the action against Mr. DeFelice were not adjacent landowners, nor were they, with one exception, lessors of "camp sites" in the area. Nor, in this case, is there any evidence of "diverson of destruction of a pre-

existing natual navigable waterway in the process of construction of the private waterway . . .".

Camp sites were being leased in the area, prior to the wrongful denial of access to the DeFelice property and the wrongful removal of the dam. (See Tr. pp.236-37, clearly showing that the statement of facts relied upon in the Fifth Circuit's Opinion were incorrect). Only after wrongful removal of the dam could the canal be used in a manner which was previously impossible, i.e., navigation from one end to the other. Despite this factual circumstance, the District Court and the Court of Appeal rest their opinion to the fact that the waterway had become subject to a public servitude of navigation after removal of the dam.

This Court's decision in *Vaughn* makes it clear, in regard to the canal in question, that there is ". . . no general right of use in the public . . ." which arises by reason of the authority over navigation conferred upon Congress by the commerce clause. On this basis, the decisions of the District Court and the Court of Appeals are clearly in error and should be reversed. Under the record before this Court, the findings of the

Court of Appeal, in particular, are not justified by the record. Nor are the conclusions reached by the District Court and Court of Appeal, based on the facts which they find to be present in the record, proper under the law.

Assuming, for argument's sake, the Corps did have jurisdiction, it is clear the Corps' regulations do not allow for the delays of litigation. Under these circumstances, as interpreted by the Corps, there are two alternative views. Either the Corps must be viewed as not having assumed a regulatory stance on this point or its interpretation of existing regulations is arbitrary and capricious.

CONCLUSION

The actions of the Corps of Engineers, Court of Appeal and District Court have placed petitioner, Savare DeFelice, in the position of having forfeited the right to gain access to his property, a right which existed until the wrongful actions of the adjacentland-owner in the depriving him os access to his property and the wrongful actions of unknown individuals in removing the dam which provided access to his property. The basis for Mr. DeFelice having

forfeited his right is, according to the Corps, the District Court and Court of Appeals, his reliance on attempts to amicably compromise his problem with the adjacent landowner and, then, resolve the problem by way of legal action, in a timely manner in a Court of competent jurisdiction. Under the rationale of this Court's decision in *Vaughn v. Vermilion Corp.*, the parties whom the Court of Appeals found would be prejudiced by Mr. DeFelice exercising his right of access to his property, are parties who have no right, even absent the previously existing and wrongfully removed dam, to be in the canal other than at the sufferance of Mr. DeFelice and the adjacent landowner. Under the facts of this case, we respectfully submit that this Court must undertake the review of the decisions below and remedy a decision which is both inequitable and contrary to existing law. The alternative, under *Kaiser Aetna*, is that the case be returned to the lower court for a determination of the damages suffered by Mr. DeFelice as a result of the taking of his property by the United States. Under *Vaughn*, the actions of the Corps of Engineers were improper and a grant of certiorari and reversal of the decision of the Court of Appeals for the Fifth Circuit

will eliminate the necessity of reaching the question of damages.

LUGENBUHL, LARZELERE, & ELLEFSON
Of Counsel

VANCE E. ELLEFSON
600 Carondelet Street
Suite 602, Central Plaza
New Orleans, La. 70130
Telephone:
(504) 523-6066
Attorney for Savare DeFelice

CERTIFICATE

I do hereby certify that I have on this 7th day of July, 1981, served a copy of the foregoing pleading on all counsel for all parties to this litigation by mailing same by United States mail, properly addressed, first class postage prepaid.

_____

UNITED STATES Of AMERICA,
Plaintiff-Appellee,

v.

Savare DeFELICE,
Defendant-Appellant.

No. 80-3397
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

April 9, 1981.

Riparian landowner appealed from an order of the United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., requiring him to remove sand and other fill materials which he had placed in a canal. The Court of Appeals, Brown, Circuit Judge, held that: (1) Cheniere Traverse Canal, a private and artificial canal, by 1965 or 1966 became navigable by operation of law and was subject to the jurisdiction of the Corps of Engineers because it was subject to the ebb and flow of the tide and was

navigable in fact because it was an arm in the flow of interstate commerce to the Gulf of Mexico, and (2) riparian landowner was required to obtain a permit from Corps of Engineers before replacing a dam across the canal where a prior dam had not been in existence for at least nine years and, after the prior dam was removed, there was an influx of campers and fishermen who invested in campsites and boats for their own pleasure as well as commerical fishing based on the navigability of the canal.

Affirmed.

1. Canals 25

Mere capability of navigability in commercial use and/or fact that canal is subject to ebb and flow of tide is sufficient to establish Corps of Engineers' jurisdiction over private and artificial canal. Rivers & Harbors Appropriation Act of 1899, § 9, 33 U.S.C.A. § 401.

2. Canals 25

Corps of Engineers may have jurisdiction over artificial and privately owned canal. Rivers & Harbors Appropriation Act of 1899, § 9, 33 U.S.C.A. § 401.

3. Navigable Waters 1(3)

There is no requirement that body of water sustain actual commerce in order to meet test of navigability in fact and to support jurisdiction of Corps of Engineers, but rather, mere capability of commerical use of body of water suffices even if such commerce could be made possible only with artificial aid. Rivers & Harbors Appropriation Act of 1899, § 9, 33 U.S.C.A. § 401.

4. Navigable Waters 2

Even shallow tidal areas, like sloughs or marshes below elevation of mean high water line, are subject to Corps of Engineers regulation. Rivers & Harbors Appropriation Act of 1899, § 9, 33 U.S.C.A. § 401.

5. Canals 25
Navigable Waters 1(6)

Cheniere Traverse Canal, a private and artificial canal, by 1965 or 1966 became navigable by operation of law and was subject to jurisdiction of Corps of Engineers because it was subject to ebb and flow of tide and was navigable in fact because it was arm in

flow of interstate commerce to Gulf of Mexico. Rivers & Harbors Appropriation Act of 1899, § 9, 33 U.S.C.A. § 401.

6. Navigable Waters 22(1)

Riparian landowner was required to obtain permit from Corps of Engineers before replacing dam across canal within Corps' jurisdiction where prior dam had not been in existence for at least nine years and, after prior dam was removed, there was influx of campers and fishermen who invested in campsites and boats for their pleasure as well as commercial fishing based on navigability of canal. Rivers & Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 1403.

7. Administrative Law and Procedure 413

Reasonable interpretation by agency of its own regulations is allowed great difference.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, POLITZ and TATE, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

On February 28, 1980, the District Court entered an injunction ordering Appellant/DeFelice to remove the sand and other fill materials which he had placed in the Cheniere Traverse Canal. His actions constituted an attempt to restore access to his property. The Court found DeFelice's actions violated provisions of the 1899 Rivers and Harbors Act (RHA) and Federal Water Pollution Control Act (FWPCA) which require the authorization of the United States Corps of Engineers (Corps) prior to any construction or polluting in any of the "navigable waters of the United States." Our review of the facts, applicable statutes and code regulations, require us to affirm the District Court's actions.

I. Up the Proverbial Creek Without A Permit

The present controversy arise out of a purchase of property by the DeFelice family in Plaquemines Parish, Louisiana in 1944. Because the land was accessible only through the property owned by Citrus Lands of Louisiana, the purchase agreement included a right of access through Citrus Lands' property to a shell-surfaced roadway atop a dam which crossed a man-made drainage canal—commonly known as the

Cheniere Traverse Canal (West Canal).[1] Eventually, the right of access lands were sold to a private individual in 1959 by Citrus Lands, Inc. When the DeFelices refused to sell their property to this same individual, a gate was placed across the right-of-way which left the property inaccessible except by water. At about this same time, unknown persons started cutting away at the dam across the canal until it was completely destroyed by late 1965 or early 1966.

DeFelice's attempts at negotiations with the adjacent landowners to remove the gate proved fruitless. Suit was filed in 1974 which resulted in the decision of *DeFelice Land Corp. v. Citrus Land of La.*, 330 So.2d 631 (La.App. 4th Cir. 1976), granting the DeFelice family right of access to and egress from the property at the point it had previously exercised under the original agreement. Pursuant to this judgment, an order was entered by the District Court for a survey to establish the metes and bounds of the original right-of-way. In July 1977, in recognition of this legally established right of passage, DeFelice began to reconstruct the dam by placing sand and other fill materials in the canal.[2] On July 17, 1977, an

1. Maps dated as far back as 1903 and aerial photos taken by the Corps as early as 1958, show the presence of the dam across the canal.

2. The record fixes the actual construction site at Woodpark Campsite approximately 1.2 miles southeasterly from Myrtle Creek, Louisiana and immediately southwesterly from Louisiana Highway 23 in Plaquemines Parish, Louisiana.

investigator of the Corps appeared at the proposed dam site and ordered the work stopped.[3] After several unsuccessful attempts to serve a cease and desist order, one was sent by certified mail to DeFelice alleging that he was in violation of §§ 9, 10 of the 1899 (RHA), 33 U.S.C.A. §§ 401, 403,[4]

3. The record reflects that by July 19, 1977, the canal which is approximately 40 feet in width at this point, had already been completely filled up to ground level on each bank and was completely blocking the waterway.

4. Section 9 of the 1899 RHA, 33 U.S.C.A. § 401 provides:

> It shall not be lawful to construct or Commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

Section 10 of the 1899 RHA, 33 U.S.C.A. § 403 provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the

and §§ 301(a), 404(a) of the (FWPCA), 33 U.S.C.A. §§ 1311(a), 1344(a)[5], for failing to obtain respectively dam construction and pollutant discharge permits.[6]

Note 4 - Continued

limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Secretary of the Army prior to beginning the same.

5. Section 301(a) of the FWPCA, *86 Stat. 844*, 33 U.S.C.A. § 1311(a) provides:

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C.A. § 1362(6) provides:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

Section 309(d) of the FWPCA, *86 Stat. 860*, 33 U.S.C.A. § 1319(d), provides:

> Any person who violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, and any person who violates any order issued by the Administrator under sub-section (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

Note 5 - Continued

Section 404(a) of the FWPCA, *86 Stat. 884*, 33 U.S.C.A. § 1344(a), provides:

> The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity of public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

6. *See* Appendix I.

The Corps subsequently initiated litigation against DeFelice seeking an injunction and order to remove the material which he had placed in the canal. DeFelice counterclaimed for the value of the property taken from him by the Corps' actions.[7] Testimony from surrounding residents whose access to other canals leading to the Gulf of Mexico had been blocked by the DeFelice's dam, led the District Court to find that the materials placed in the canal had reduced the depth of the water and impaired navigation. The Court entered injunction on February 28, 1980, and ordered DeFelice to remove this material in an amount sufficient to restore the depth of the water and the contour of the canal adjacent to the dam site to its pre-1977 condition.[8]

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7. The Court ordered separate trials for DeFelice's counterclaim for $100,000 against the Government's alleged "taking" of the property. That suit is still pending.

8. The statutory authority for the injunction is found in 33 U.S.C.A. § 406, and 33 U.S.C.A. § 1319(d), (*see n.4, supra*):

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said

DeFelice seeks a review of this judgment alleging that the District Court erred (i) in finding that the Corps had jurisdiction over the replacement of the dam in a private canal based upon the alleged "navigability" of the canal, and (ii) in accepting the Corps' interpretation of the phrase "currently serviceable" as used in the regulations.

The Ebb And Flow Of "Navigability" — Corps' jurisdiction?

[1] The principal question on appeal is whether the District Court correctly found that the Corps had jurisdiction by operation of law from the time the canal became capable of navigation under § 10 of the (RHA), 33 U.S.C.A. § 403. *(See n.4, supra)*[9]. The focal point then becomes the correct standard for determining "navigability" and ultimately Corps' jurisdiction. The Court below held that the mere capability of navigability in commercial use and/or the fact that the canal was subject to the ebb and flow of the tide was sufficient to establish Corps' jurisdiction even over a private and artificial canal. That finding was not clearly erroneous.

The Corps has adopted the following general definitions of "navigable waters of the United States":

Note 8 - Continued

sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

9. DeFelice conceded at trial that the canal is subject to the FWPCA, therefore a discussion of the jurisdictional scope of the FWPCA would not be dispositive of this case.

§329.3 General policies.

Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by the Federal Courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined

when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in subparagraph (a) above; and

(c) Defined geographic limits of the waterbody.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial [sic] aids have been or may be used to make the waterbody suitable [sic] for use in navigation.

(a) *Existing improvement: artificial [sic] waterbodies.* (1) An artifical [sic] channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate

commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artifical [sic] waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area. (See § 329.12(b).)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to

certain regulatory authorities.

33 CFR § 329.4, 329.8(a)(1) (1979).

The Supreme Court recently quoted this definition with obvious approval in *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.6, 100 S.Ct. 383, 388 n.6, 62 L.Ed.2d 332, 341 n.6, (1979). DeFelice, however, rejects the above definition of "navigability" and the District Court's apparent reliance on it to sustain Corps' jurisdiction. Instead, he maintains that the canal waters are not "navigable waters of the United States" because the canal in question is a (i) private and artificial canal and (ii) there was no factual finding to support a conclusion that the canal was a part of a "continuous waterway sustaining interstate commerce." DeFelice suggests that the correct standard of "navigability" should be a two-step finding of (i) navigability in fact and (ii) connection with a continuous waterway system—neither of which was met here. Moreover, he complains that jurisdiction should not rest on the result of an illegal act—the wrongful removal of the dam—which ultimately rendered the canal navigable in fact.

[2] Neither the record[10] nor case law supports

10. There is no evidence in the record for us to assume that the DeFelice family or anyone else actually owned the canal.

DeFelice's idea that the Corps lacks jurisdiction because the canal was artificial and are privately owned. *See, e.g., Kaiser Aetna v. United States,* 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979) (private waterway may come within term "navigable waters of the United States if joining existing interstate commerce waterway)"; *United States v. Saxton Cove Estates, Inc.,* 526 F.2d 1293 (5th Cir. 1976) (private canals above the mean high line opening into navigable waterway subject to Corps' jurisdiction); *United States v. Joseph G. Moretti, Inc.* 526 F.2d 1306 (5th Cir. 1976) (dredging of private canal upstream subject to Corps' jurisdiction where navigable waters were affected downstream).

[3] Applying Defelice's suggested standard for the moment, we find that the record does conclusively demonstrate that Cheniere Traverse Canal is (i) tidal—a fact stipulated to by both parties, (ii) navigable in fact—has in the past, does presently or is capable of supporting transportation in interstate or foreign commerce, and (iii) connected with a continuous interstate waterway. Several witnesses who had leased campsites along the canal beginning in the early 1960's testified that their 28-30 foot Lafayette Skiff type shrimping vessels were too large to safely maneuver in other near-by water routes except in the connecting canals of Cheniere Traverse, Timbers and

Wilkinson.[11]. In addition, the same testimony with the aid of United States Geological Survey Maps unmistakably demonstrates that these connecting canals flow into the Gulf of Mexico and thus form a part of a continuous interstate waterway system.[12]

11. In addition, we observe for clarity sake that there is no requirement that a body of water sustain actual commerce in order to meet the test of navigabilty in fact. *Weizmann v. Dist. Eng., U.S. Army Corps of Engineers*, 526 F.2d 1302, 1305 (5th Cir. 1976). *E.g., United States v. Diamond*, 512 F.2d 157, 160 (5th Cir.), *cert. denied*, 423 U.S. 928, 96 S.Ct. 275, 46 L.Ed.2d 255 (1975). Rather, judicial interpretation recognizes that "mere capability of commercial use of a body of water suffices even if such commerce could be made possible with artificial aid." *United States v. Appalachian Power Co.*, 311 U.S. 377, 407, 61 S.Ct. 291, 299, 85 L.Ed. 243, 252 (1940). This idea was recognized as early as 1921 in *Economy Light and Power Co. v. United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921).

> [A] river having the actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it is not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions . . . The act in terms applies to "any . . . navigable river, or other navigable body of water of the United States"; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as were, at the time of its passage, or now are, actually open to use. . .

12. The record reflects the following geographical description: The canal is connected to Barataria Bay and the Gulf of Mexico which are tidal waterbodies and commercial waterways, by way of Wilkinson Canal, a waterway that runs in a north-south direction between Bayou Barataria and Myrtle Grove, Louisiana. The Wilkinson Canal runs through Plaquemines Parish wetlands, lakes, and bayous, particularly Bayou Dupont. This waterway is approximately 12.5 miles in length. The Timber Canal, which runs in an easterly-westerly direction connects with and crosses the Wilkinson Canal about three-quarters (0.75) of a mile south of Louisiana Highway 23 at Myrtle Grove, Louisiana. The Timber Canal connects with the canal, known

[4] In reaching its decision the District Court relied on *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974) which holds that once the artificial canals are connected to tidal water bodies, it and all its inland artificial tributaries become "navigable waters of the United States" by operation of law. *Stoeco*, 498 F.2d at 611. This Court has followed that concept in the case of *United States v. Saxton Cove Estates, Inc*,. 526 F.2d 1293 (5th Cir. 1976), where Corps' jurisdiction was upheld over five canals connecting to Black Water Sound which was a tidal water body. In urging this Court to adopt the two-step test for "navigability", DeFelice has apparently confused the requirements of "navigable waters of the United States" for tidal coastal waters, with the requirements for non-tidal inland waters. We make this assumption because of the cases which DeFelice relies on in support of this proposition.[13] These cases are inapplicable because they deal with *landlocked, non-*

Note 12 - Continued
locally as the Cheniere Traverse Canal or West Canal, approximately one and two tenths (1.2) of a mile easterly from the Wilkinson Canal. The site of the unauthorized canal closure in the Cheniere Traverse (or West) Canal is about two hundred (200) feet east of the Canal's junction with the Timber Canal.

13. The Court in *Minnehaha Creek Watershed Dist. v. Hoffmann*, 597 F.2d 617 (8th Cir. 1978) found that there was no RHA jurisdiction over a non-tidal inland lake located entirely within one state, Minnesota, and with only one outlet to the Mississippi River which had been continuously dammed since 1852. The Court based its holding upon the lack of an interstate waterway connection. Similarly, in *National Wildlife Federation v. Alexander*, 613 F.2d 1054 (D.C. Cir. 1979), the Court held that a historical navigable, non-tidal, landlocked lake located in North Dakota was not subject to § 10 of RHA.

tidal water bodies where the Courts have generally required a connection with other interstate waterways[14] unless the waterway is in fact navigated regularly by vessels in commerce. As previously established Cheniere Traverse Canal is *not* landlocked, and *is* tidal. Tidal waters by their very nature form a continuous water body with interstate waterways. Requiring tidal water bodies to meet the test for non-tidal, navigable in fact water bodies (which coincidentally they do here anyway) is really to eliminate the ebb and flow test. The law is to the contrary because even shallow tidal areas, like sloughs or marshes below the elevation of a mean high water line, are subject to regulation under the 1899 RHA. *Stoeco Homes,* 498 F.2d at 597.[15]

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14. The inapplicability of these two cases (*see* n.13, *supra*) is further highlighted by DeFelice's reliance on the cases of *The Daniel Ball,* 77 U.S. (10 Wall) 557, 19 L.Ed. 999 (1870), and *The Genesee Chief,* 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851) which dealt with expanding admiralty jurisdiction beyond coastal tide waters to the inland non-tidal rivers of the United States. These cases did not reject the tidal theory over coastal waters. Rather, the Court chose not to apply it because that would have unduly limited jurisdiction over inland waters.

15. There are numerous cases holding that ebb and flow of the tide is a valid test of navigability of tidal waters for the Corps' jurisdiction under RHA. *See Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979); *United States v. Stoeco Homes, Inc.,* 498 F.2d 597 (3rd Cir. 1974); *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978); *Tatum v. Blackstone,* 319 F.2d 397 (5th Cir. 1963); *United States v. Saxton Co. Estates, Inc.,* 526 F.2d 1293 (5th Cir. 1976).

[5] We conclude that the District Court applied the correct standard of "navigability" in this case[16] and that Cheniere Traverse Canal by 1965 or 1966 became navigable by operation of law, because (i) it was subject to ebb and flow and (ii) navigable in fact because it was an arm in the flow of interstate commerce to the Gulf of Mexico.[17]

Rising Waters?—Dam Not "Currently Serviceable"

[6, 7] The second point which DeFelice challenges concerns the Corps' interpretation of the phrase "currently serviceable" in the regulation as it applies to an exemption to the permit requirements found in 33 CFR § 322.4(c). (*See* Appendix I). The real question is can a dam which disappeared no later than 1966 be considered "currently serviceable" within the meaning of the 1977 regulation? We think not. Government witnesses testified that the Corps' interpretation of "currently serviceable" means that the

16. The Supreme Court recently conceded in *Kaiser Aetna*, that precedent does not disclose a single test or standard for navigability, but instead recognizes several distinct tests, (i) ebb and flow, (ii) connection with a continuous interstate waterway, (iii) navigable capacity, and (iv) navigable in fact. 444 U.S. at 170-172, 100 S.Ct. at 387-389, 62 L.Ed.2d at 340-41.

17. Having illustrated that Corps jurisdiction occurred by operation of law, we find no merit in DeFelice's argument that jurisdiction was improperly created due to an unauthorized or illegal act. Besides, DeFelice presented no evidence at trial pertaining to this issue and on appeal has failed to cite any law to support his position.

structure was providing the service for which it was intended at the existing time. The Corps uses a rule of reasonableness as to how soon after a work or structure is torn out it must be replaced. A reasonable length of time is defined as a time period in which there could have been no real change in circumstances surrounding the structure. If an otherwise Corps regulated structure exists and performs a service, it may normally be maintained and repaired without individual § 10 or § 404 permits. If not, an individual permit is normally needed first, and any changed circumstance since the structure's last existence will be carefully weighed. This balanced approach is clearly reasonable. The record here indicates that there had been real changes in circumstances at the dam site. After the prior dam was removed, there was an influx of campers and fishermen who invested in campsites and boats for their pleasure as well as commercial fishing based on the navigability of the canal. Considering the facts (i) changed circumstances, and (ii) that prior to DeFelice's attempt to ever bring suit, the dam had not been in existence for at least nine years, the Court upheld the Corps' interpretation of its regulations as a reasonable one. The reasonable interpretation by an agency of its own regulations is allowed great deference. *Udall v. Tallmann*, 380 U.S. 1, 85 S. Ct. 792, 13 L.Ed.2d 616 (1955), *Soliz v. Plunkett*, 615 F.2d 272 (5th Cir. 1980); *Kinnett Dairies, Inc. v.*

Farrow, 580 F.2d 1260 (5th Cir. 1978); *Bone v. Hibernia Bank*, 493 F.2d 135 (5th Cir. 1974). The District Court's finding that this interpretation is reasonable is another way of saying it was not arbitrary, capricious or an abuse of discretion. we affirm this finding as well.[18]

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18. Related to the above argument, that DeFelice is exempt by regulation from obtaining the permit required by § 10 of the RHA of 1899, is the argument by DeFelice that he is exempt by regulations from obtaining a permit required by § 404 of the FWPCA, 33 U.S.C.A. 1344 (*see* n.4, *supra*). DeFelice admits that the permit required by 33 U.S.C.A. § 1344 would be applicable to the fill he was dumping into the canal but for an alleged exemption in the regulation. DeFelice relies on 33 CFR 209.120e(2)(iii) (1976) which language was carried over into the 1977 regulations.

> § 209.120 Permits for activities in Navigable Waters or Ocean Waters.
>
> (e) *Activities Requiring Authorizations.* (1) Structures or work in navigable waters of the United States. Department of the Army authorizations are required under the River and Harbor Act of 1899 (See paragraph (b) of this section) for all structures or work in navigable waters of the United States except for bridges and causeways (see Appendix A), the placement of aids to navigation by the U.S. Coast Guards, structures constructed in artificial canals within principally residential developments where the canal has been connected to a navigable water of the United States (see paragraph (g)(11) of this section),and activities that were commenced or completed shoreward of established harbor lines before May 27, 1970 (see 333 CFR § 209.150) other than those activities involving the discharge of dredged or fill material in navigable waters after October 18, 1972.
>
> (2) *Discharges of dredged material or of fill material into navigable waters.* (i) Except as provided in subparagraphs (2)(ii) and (iii) of this paragraph, Department of the Army permits will be required for the discharge of dredged material or of fill material into navigable waters in accordance with the following phased schedule:

(iii) Discharges of dredged or fill material in waters other than navigable waters of the United States that have been completed by the effective date of this regulation and discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States that are part of an activity that was commenced before the publication of this regulation, that will be completed within six months of the publication of this regulation, and that involves a single and complete project and not a number of projects associated with complete development plans are hereby authorized for purposes of Section 404 of the Federal Water Pollution Control Act without further processing under this regulation: *Provided, however,* That the exemption of these types of activities from the requirements of this regulation shall not be construed as a waiver of the requirement to obtain a State water quality certification under section 401 of the Federal Water Pollution Control Act or a certification of compliance with a State's approved coastal zone management program pursuant to section 307(c)(3) of the Coastal Zone Management Act in those cases where the discharge of dredged or fill material has not been completed by the date of this regulation: *And further provided,* That the procedures of this regulation shall apply to any activity involving the discharge of dredged or fill material commenced before the date of this regulation if the District Engineer determines that the interests of water quality as expressed in the guidelines (see 40 CFR Part 230) so require. The term "commenced" as used herein shall be satisfied if there has been, before the date of this regulation, some discharge of dredged or fill material into the navigable water as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor.

This regulation is obviously inapplicable. It provides that discharges of fill material, completed prior to the effective date of the regulation, "into waters other than navigable waters of the United States that were part of an activity which commenced before the publication of the regulation, that will be

DeFelice's action in placing fill materials into the Cheniere Traverse Canal—a "navigable water of the United States"—without a permit, evoked the Corps' jurisdiction and constituted a clear violation of RHA and FWPCA. Because we find no applicable exemptions in this case to the permit requirements, we uphold the District Court in all of its findings and judgment.

AFFIRMED.

Note 18 - Continued
completed within six months of the publication of this regulation" are authorized for purposes of § 404 FWPCA. DeFelice's activities were neither completed before the effective date of the regulation, nor started six months before publication of the regulation. Nor was the discharge into "waters other than a navigable waters of the United States."

Substantially the same permission for "replacement of any previously authorized, currently serviceable fill" is applicable to § 404 of the FWPCA, as was applicable to permits required under § 10 of the RHA of 1899. However, for the same reasons as those stated in the text above, the fill deposited by DeFelice in July 1977 would not be replacement of "currently serviceable" fill for purposes of § 404 of the FWPCA for the same reason it was not "currently serviceable" for purposes of § 10 permit. It is clear that DeFelice is not exempt from the permit. It is clear that DeFelice is not exempt from the permit requirement by § 404 FWPCA. Therefore, this is an independent ground to support the judgment of the District Court.

DeFelice also argues that the regulations published July 19, 1977, 42 Fed.Reg. 37122 *et seq.*, are inapplicable because they could not go into effect for thirty days after publication. This argument is irrelevant because the District Court has determined, as we do, that DeFelice violated the statutes, §§ 9, 10 of the RHA and §§ 404 of the FWPCA, which must stand even if there were no regulations involved.

APPENDIX I

After July 19, 1977, the following regulations, 33 C.F.R. 320, 321, 322, 323, in pertinent part, were in effect:

PART 320—GENERAL REGULATORY POLICIES

Sec.

320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related legislation.
320.4 General policies for evaluating permit applications

AUTHORITY: 33 U.S.C. 401 et.seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 42 FR 37133, July 19, 1977, unless otherwise noted.

§ 320.1 Purpose and scope.

(a) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR 321—329) prescribe the statutory authorities, and general and special policies and procedures applicable to the

review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal legislation applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable to the review of all activities that require Department of the Army permits. Parts 321—324 address the various types of activities that require Departament of the Army permits, including special policies and procedures applicable to those activities as follows:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) All other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) All activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of fixed structrues

and artificial islands on the outer continental shelf (Part 322);

(5) All discharges of dredged or fill material into the waters of the United States (Part 323); and

(6) All activities involving the transportation of dredged material for the purpose dumping it in ocean waters (Part 324).

* * * * * *

"navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important that the reader understand the difference from the outset. "Navigable waters of the United States" are defined in 33 CFR 329. These are the traditional waters where permits are required for work or structures pursuant to sections 9 and 10 of the River and Harbor Act of 1899. "Waters of the United States" are defined in 33 CFR 323.2(a). These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to section 404 of the Federal Water Pollution Control Act Amendments of 1972.

* * * * * *

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) (hereinafter referred to as Section 9) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorizaton is designated a permit. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (80 Stat. 941, 49 U.S.C. 1155g(6)(A)). See also 33 CFR Part 321. A Department of the Army authorization is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344). See CFR Part 323.

(b) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) (hereinafter referred to as section 10) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters, is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit, general permit, or letter of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by Section (4)(f) of the Outer Continental Shelf Lands Act of 1953 (67Stat. 463; 43 U.S.C. 1333(f)). See also 33 CFR Part 322.

* * * * * *

(g) Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500, 86 Stat.

816, 33 U.S.C. 1344) (hereinafter referred to as Section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. See 33 CFR 323. The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army, published in 40 CFR Part 230.

* * * * * *

33—Navigation and Navigable Waters

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.

321.1 General.
321.2 Definitions.
321.3 Special policies and procedures.

AUTHORITY: 33 U.S.C. 401.

SOURCE: 42 FR 37138, July 19, 1977 unless otherwise noted.

§ 321.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Secretary of the Army will decide whether Department of the Army authorization for a dam or dike in a navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the District Engineer when he forwards his report to the Secretary of the Army, through the Chief of Engineers, pursuant to 33 CFR 325.11

(b) A Department of the Army application under Section 9 will not be processed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate State legislature has been obtained if the navigable water of the United States is solely within the boundaries of one State.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.

322.1 General.
322.2 Definitions.
322.3 Activities requiring permits.
322.4 Structures and work permitted by this regulation.
322.5 Special policies and procedures.

Appendix A—U.S. Coast Guard/Chief of Engineers Memorandum of Agreement.

Appendix B—Delegation of Authority.

AUTHORITY: 33 U.S.C. 403.

SOURCE: 42 FR 37139, July 19, 1977, unless otherwise noted.

§ 322.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required under Section 10 for all structures or work in or affecting navigable waters of the United States except for bridges and causeways (see Appendix A) and structures or work licensed under the Federal Power Act of 1920. Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR Part 328) also do not require Section 10 permits; However, if those activities involve the discharge of dredged or fill

material into waters of the United States after October 18, 1972, a Section 404 permit is required (see 33 CFR Part 323).

(1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) above, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody. For purposes of a Section 10 permit, a tunnel or other structure under or over a navigable water of the United States is condsidered to have an impact on the navigable capacity of the waterbody.

* * * * * *

§ 322.4 Structures and work permitted by this regulation.

The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:

(a) The placement of aids to navigation by the U.S. Coast Guard, see § 322.5(e), below;

(b) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized; see § 322.5(G), below;

(c) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or of any currently serviceable structure constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure, and further provided that the structure to be maintained has not been put to uses differing from used specified for it in any permit authorizing its original construction;

(d) Marine life harvesting devices such as pound nets, crab traps, eel pots, lobster traps, provided there is no interference with navigation;

(e) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures provided there is no interference with navigation;

(f) Survey activities including core sampling; and

(g) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation.

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 10 permits. (See Appendix B.) The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* Department of the Army permits will be required for structures or work in or affecting navigable waters of the United States. Certain structures or work specified in § 322.4 are permitted by this regulation. If a structure or work is not permitted by this regulation, an individual or general Section 10 permit will be required.

* * * * * *

of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* (1) A Canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, above, if it constitutes a navigable water of the United States , or if it is connected to navigable waters of the United States in a manner which affects their course, condition, or capacity. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of this regulation. For all other canals the exercise of regulatory authority is restricted to those activities which affect the course, condition, or capacity of the navigable waters of the United States. Examples of the latter may include the length and depth of the canal; the currents, circulation, quality and turbidity of its waters, especially as they affect fish and wildlife values; and modifications or extensions of its configuration.

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.

323.1 General.

323.2 Definitions
323.3 Activities requiring permits.
323.4 Discharges permitted by this regulation.
323.4—1 Discharges prior to effective dates of phasing.
323.4—2 Discharges into certain waters of the United States.
323.4—3 Specific categories of discharges.
323.4—4 Discretionary authority to require individual or general permits.
323.5 Special policies and procedures.

Appendix A—Delegation of authority.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 42 FR 37144, July 19, 1977, unless otherwise noted.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:[1]

(1) The territorial seas with respect to

1. The terminology used by the FWPCA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the terriorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.):

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (man-made nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition.)

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)—(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of tributary system to interstate waters or to navigable waters of the United States, the degradation or

destruction of which could affect interstate commerce.[2]

2. In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)—(4) fill within this mandate a discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a)(1)(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a)(5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4—2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for aquatic environment as expressed in the EPA Guidelines (40 CFR 230) require regulation through an individual or general permit. (See 323.4—4).

Title 33—Navigation and Navigable Waters

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction and all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

(b) The term"navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high watermark (mean higher high water on the Pacific Coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

* * * * * *

(m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changng the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site development fills for recreational, industrial, commercial, residential, and other used causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, in take and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

* * * * * *

§ 323.3 Discharges requiring permits.

(a) *General.* Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain

discharges specified in §§ 323.4—1, 323.4—2, and 323.4—3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area. (See also § 323.4—2 for discharges that are permitted by this regulation.)

(4)After July 1, 1977, discharges into all waters of the United States. (See also § 323.4-2 for discharges that are permitted by this regulation.

(b) *Individual permits.* Unless permitted by this regulation (§§ 323.4—1, 323.4—2 and 323.4—3) or authorized by general permits (§ 323.3(c)), the discharge of dredged or fill material into waters of the United States will require an individual Department of the Army permit issued in accordance with the policies in § 320.4 and procedures in 33 CFR Part 325.

* * * * * * *

§ 323.4 Discharges permitted by this regulation.

(a) *General.* Discharges of dredged or fill material specified in §§ 323.4—1, 323.4—2 and 323.4—3, below are hereby permitted for purposes of Section 494 without further processing under this regulation (individual applications are not needed), except as provided in § 323.4—4 below. Permits may, however, be required under Section 10 of the River and Harbor Act of 1899 (see 33 CFR 32). Sections 323.4—1, 323.4—2, and 323.4—3 do not obivate the requirement to obtain State or local assent required by law for the activities permitted therein.

§ 323.4—1 Discharges prior to effective dates of phasing.

(a) Discharges of dredged or fill material in waters of the United States that occur before the phase-in dates specified in § 323.3(a)(2)—(4) above are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met.

(b) Discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States (see 33

CFR 329) that are part of an activity that was commenced before July 25, 1975, that were completed by January 25, 1976, and that involve a single and complete project and not a number of projects associated with a complete development plan are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met. The term "commenced" as used herein shall be satisfied if there has been, before July 25, 1975, some discharge of dredged or fill material as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor

(c) For the purposes of Section 404, the following conditions must have been satisfied for the discharges occurring before the dates specified in paragraph (a) and (b) above:

(1) That the discharge was not located in the proximity of a public water intake;

(2) That the discharge did not contain unacceptable levels of pathogenic organisms in areas used for recreation involving physical contact with the water;

(3) That the discharge did not occur in areas of concentrated shellfish production; and

(4) That the discharge did not destroy or endanger the critical habitat or a threatened or endangered species, a identified under the Endangered Species Act.

§ 323.4—3 Specific categories of discharges.

(a) The following discharges of dredged or fill material into waters of the United States are hereby permitted for purposes of Section 404, provided the conditions specified in this paragraph and paragraph (b) below are met:

* * * * * *

(5) The repair, rehabilitation or replacement of any previously authorized, currently serviceable fill, or of any currently serviceable fill discharged prior to the requirement for authorization; provided such repair, rehabilitation or replacement does not result in a deviation from the specifications of the original work, and further provided that the fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CIVIL ACTION
VERSUS	78-2200
SAVARE DeFELICE	SECTION "J"

JUDGMENT

For the written reasons attached hereto,

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment rendered herein in favor of plaintiff, United States of America, and against defendant, Savare DeFelice, ordering defendant to restore the canal to its original depth and contour prior to the commencement of defendant's unauthorized activity within ninety (90) days from the date of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant is enjoined from further construction of a passageway across the canal without first obtaining approval and authority from the Department of the Army Corps of Engineers.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant shall bear all costs of these proceedings.

New Orleans, Louisiana, this the 28 day of February, 1980.

/S/ Signed (illegible)

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CIVIL ACTION
VERSUS	NO. 78-2200
SAVARE DeFELICE	SECTION "J"

REASONS FOR JUDGMENT

On February 26, 1944, Esteff DeFelice purchased property for the DeFelice Land Corporation from Citrus Lands of Louisiana. Included in the agreement was a right of access through Citrus Lands' property across a canal. In existence at the time of the sale was a dam which crossed the canal and which led to the DeFelice property. Eventually, Citrus Lands of Louisiana was purchased by Mr. Louis Roussel. Subsequently, Mr. Roussel denied the DeFelice family their right of access. Over a period of time from 1960 to about 1965 or 1966, the dam was completely removed from the canal by persons unknown. The defendant, Mr. Savare DeFelice, negotiated unsuccessfully with Mr. Roussel until 1971 in the attempt to reestablish the right of access. Eventually, in 1974, Mr. DeFelice filed suit in the district court in Plaquemines Parish. The litigation culminated in 1976 when the Fourth Circuit Court of Appeals of Louisiana held that the DeFelice family had a right of access at the point

where access had previously been exercised.

On July 17, 1977, the defendant, Savare Defelice, by his own acknowledgment, sought to replace the dam by placing sand in the canal without having obtained a permit from the Army Corps of Engineers. The United States Government, filed suit seeking to restore the canal, to enjoin the defendant from further unauthorized placing of fill material in the canal and to impose a civil penalty.

Trial in this matter was held January 30th and 31st, 1980. This Court, having fully considered the verified complaint herein, the evidence adduced in the form of oral testimony and exhibits, the statutes and regulations at issue and the argument of counsel for both sides, hereby makes the following findings of fact and conclusions of law:

The Court finds that it has subject matter jurisdiction pursuant to the federal questions involved and due to the fact that the United States is the plaintiff.

Plaintiff contends that the canal in question is subject to the Rivers and Harbors Act of 1899 and the Federal Water Pollution Control Act and the respective permit requirements since the canal is navigable. The defendant concedes that the canal is

subject to the Federal Water Pollution Control Act but contends that the Rivers and Harbors Act is inapplicable because the canal was not navigable in fact at the time of the destruction of the original dam. The Court finds that jurisdiction over the canal under the Rivers and Harbors Act existed by operation of law from the time that it became capable of navigation, i.e. around 1965 or 1966. See *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3rd Cir., 1974).

The testimony of Government witnesses revealed that the Army Corps of Engineers by 1974 or 1975 had interpreted their regulations to grant jurisdiction over canals subject to the ebb and flow of the tide. The parties stipulated that the canal in question is subject to the ebb and flow of the tide. Defendant's argument that the canal is private and artificial cannot negate jurisdiction under the Rivers and Harbors Act once the capability of navigability in commercial use and/or the fact that the water is subject to the ebb and flow of the tide is established. See *Weizmann v. District Engineer*, 526 F.2d 1302 (5th Cir., 1976).

Section 9 of the Rivers and Harbors Act, 33 U.S.C. 401 provides that:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadsted,

haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army."

The Court finds that the the construction performed by the defendant constituted a dam under Section 9 and is subject to the permit requirements of the United States set forth at 33 C.F.R. 321.3.

Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403 provides that:

> "The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited."

Additionally, Section 10 states that:

> "It shall not be lawful to excavate or fill or in any manner to alter or modify the course, location, condition or capacity of any port, roadsted, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

The Court finds that the construction created by the defendant obstructed the canal and altered its condi-

tion and capacity under Section 10 of the Rivers and Harbors Act and is subject to the permit requirements of the United States set forth in 33 C.F.R. 322.3.

33 C.F.R. 322.4 creates a nationwide permit which provides an exemption from individual Section 10 permit requirements for structures listed in Sections A—G. Section G of that rule provides an exemption for:

> "Structures or work completed before the 18th of December, 1968 or in water bodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation."

Defendant contends that Section G is applicable in this case. The Court considers this contention to be without merit for the reason that the new dam was not completed before December 18, 1968 and did indeed interfere with navigation. The material placed in the canal by the defendant initially blocked the canal and after being cut by persons unknown continues to reduce the width and depth of the canal at this point. Since the required elements under Section G do not exist, the section cannot provide any exemption of the permit requirement.

Defendant also argues that Section C of 33 C.F.R. 322.4 is applicable. That section eliminates the

necessity of a permit in regard to:

> ". . . the repair, rehabilitation, or replacements of any previously authorized, currently serviceable, structure or of any currently serviceable structure constructed prior to the requirement of authorization; provided such repair, rehabilitation, or replacement does not result in the deviation from the plans of the original structure, and further, provided that the structure to be maintained has not been put to used differing from uses specified for it in any permit authorizing its original construction."

Mr. John and Mr. Ventola, both Government witnesses, testified that the Army Corps of Engineers interprets "currently serviceable" to mean that a structure must be existing within a period of time of its reconstruction. Not only is such an interpretation by the Corp given great deference by a court (*Udall v. Talman*, 85 Sup.Ct. 92, 1965), but that interpretation is a reasonable one here.

The Court finds that the dam was not currently serviceable when it was replaced. By 1965 or 1966, the dam was completely removed from the canal. In 1965, defendant started negotiations with Mr. Roussel about the access and these negotiations continued unsuccessfully until 1971. Not until 1974 did the defendant file a lawsuit. In 1976, judgment was rendered in state court granting defendant access. A fifteen-month delay existed between the favorable ap-

pellate court decision on April 13th 1976 and the construction in July of 1977. From the above recital of facts, it is obvious that Mr. DeFelice waited too long and for no justifiable reason in attempting to reconstruct the dam. For six years the defendant negotiated and then for the following three years the defendant did nothing. The Court finds that the construction of the dam in question cannot be seen as an intent to recontruct a currently serviceable dam when the dam had not been inexistence for nine years and where no justifiable reason for the delay in repair existed.

Section 301 of the Federal Water Pollution Control Act, 33 U.S.C.1311 states that:

> "Except as in compliance with this Section and Sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

Sand is defined as a pollutant in 33 U.S.C. 1362(6) and thus the placing of the sand in the canal as a dam violated the Federal Water Pollution Control Act. The discharge of such fill material into navigable waters is subject to the permit requirements of Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344. The exemptions for the permit requirements under the Federal Water Pollution Control Act found

under 33 C.F.R. 309.120(d) (6) (ii), 33 C.F.R. 323.4—3(a) (5) and under the amendments to Section 404 of the Federal Water Pollution Control Act are not applicable because all involve currently serviceable structures which the Court has determined do not exist under the facts involved.

Defendant's argument that the federal court must give "full faith and credit" to the judgment of the state court and thus that the defendant is entitled to reconstruct the dam in accordance with the Louisiana appellate decision is not in response to the precise issue involved. Defendant's right to construct a crossing without a permit, not his right of access, is the issue here. The state court judgment granting a right of access does not conflict with the federal requirement of a permit.

In addition to enjoining defendant from further construction without obtaining Corps approval, the plaintiff seeds restoration of the canal and the imposition of a civil penalty. Section 12 of the Rivers and Harbors Act, 33 U.S.C. 406 and Section 319B of the Federal Water Pollution Control Act Amendments of 1972,33 U.S.C. 1319(b) provide for restoration by removal of the structures erected as a remedy for the violation fo the respective Acts. The Court has concluded that the material reduced the depth of the

water in the canal impairing navigation and thus the defendant is ordered to remove this material, at his expense, in an amount sufficient to restore the depth of the water and the contour of the canal adjacent to the dam site to its original condition.

Section 319D of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1319(d) provides for a maximum penalty of $10,000.00 per day for each day of the violation to be imposed within the discretion of the Court. See *Weizman v. Corps of Engineers*, 526 F.2d 1302 (5th Cir., 1976); *United States v. Golden Acres, Inc.*, No. 76-0023, civil 4 (E. D. N. C., 1977). The Court finds that here the imposition of a fine would not be justifiable. The defendant was attempting to place a dam across the canal since the state court had determined that the defendant had a right of access over the Roussel property. Certainly, the defendant's reason for building the dam and his reliance on the state court judgment as justification for such are relevant considerations in assessing a fine. Further, the defendant was not aware that the canal was subject to regulation by the Corps nor that a permit was required to build the dam. Though ignorance of the law is no defense, the imposition of a fine in addition to ordering restoration of the

canal would be an undue burden and inequitable under the circumstances.

For these reasons, defendant is ordered to restore the canal to its original depth and contour prior to commencement of defendant's unauthorized activity within ninety (90) days from the date of this judgment and is enjoined from further construction of a passageway across the canal without first obtaining approval and authority from the Department of Army Corps of Engineers.

New Orleans, Louisiana, this the 28 day of February, 1980.

/S/ PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

C-1

DeFELICE LAND CORPORATION

v.

CITRUS LANDS OF LOUISIANA, INC.

No. 7377.

Court of Appeal of Louisiana,
Fourth Circuit

April 13, 1976.

Plaintiff, alleging that it had no means of ingress or egress to its land, which was surrounded by defendant's land, brought suit for designation of servitude of passage across defendant's land, and alternatively, for maintenance and recognition of conventional servitude across defendant's property acquired by plaintiff's ancestor in title. The Twenty-Fifth Judicial District Court, Parish of Plaquemines, No. 16-506, Eugene E. Leon, Jr., J., decided case in favor of defendant, and plaintiff appealed. The Court of Appeal, Schott, J., held that where title did not designate location of servitude, plaintiff was entitled to maintain servitude at location where servitude had been previously exercised.

Amended and remanded.

1. Easements 44(1)

Succession: Phrase "manner in which it is to be used," in statute providing that if title by which passage is granted does not designate manner in which it is to be used, use which person to whom servitude is granted previously made of it will serve to interpret title, has same meaning as it does in statute providing that "if manner in which servitude is to be used" is uncertain, owner of estate which owes servitude is bound to fix place where he wishes it to be exercised, i.e., place necessary for exercise of right of passage; accordingly, where title does not designate manner in which servitude it to be used, use previously made of it will serve to interpret title. LSA-C.C. arts. 700, 777, 779, 780.

2. Easements 48(3)

Succession: Where title established plaintiff's general right of ingress and egress equivalent to servitude of passage but failed to establish location of servitude, plaintiff was entitled to have his servitude at location of prior exercise of servitude. LSA-C.C. arts. 700, 777, 779, 780.

Lemle, Kelleher, Kohlmeyer & Matthews, Vance E. Ellefson and William S. Penick, New Orleans, for plaintiff-appellant.

Porteous, Toledano, Hainkel & Johnson, William W. Miles, New Orleans, for defendant-appellee.

Before GULOTTA and SCHOTT, JJ., and P. C. ST. AMANT, Assigned Judge.

SCHOTT, Judge.

Plaintiff, alleging that it had no means of ingress or egress to its land, which was surrounded by defendant's land, brought this suit for designation of a servitude of passage across defendant's land, pursuant to LSA-C.C. Art 699 and alternatively, for maintenance and recognition of a conventional servitude across defendant's property acquired by plaintiff's ancestor in title. Defendant admitted that plaintiff was entitled to a servitude of passage, and the only issue became the proper location of the right-of-way.

The titles of both pieces of property were once held by a common ancestor in title who included in the act of sale to plaintiff's ancestor the following:

> ". . . anything in this act of sale to the contrary notwithstanding the vendee, his heirs and

assigns, shall have ingress and egress to the herein conveyed property over and across the full depth of the said conveyed property in front of the forty arpent line."

For many years this right of passage was exercised by plaintiff and its ancestors in title over a shell road running across a piece of defendant's property. This road commenced at a bridge over a drainage canal into plaintiff's property on the southwest and Louisiana Highway 23 on the northeast end of this road. At some point in time after defendant purchased the property to the northeast of plaintiff's, a gate was installed on the southwest side of the road, preventing plaintiff from using it for access to and egress from its property. This is the location which plaintiff championed at the trial of the case for the exercise of the servitude.

Defendant championed another location some distance southeast of the first location which would connect plaintiff's property to Lake Hermitage Road at a point some distance from its intersection with Highway 23.

The evidence shows that the distance between plaintiff's land and Highway 23, at the original location designated at point A, would be 580 feet, while

the distance between plaintiff's land and the Lake Hermitage Road, designed as point B, would be 529.84 feet. In either case plaintiff would be required to construct a bridge across the canal dividing its property from defendant's. However, Highway 23 is paved with black-top while Lake Hermitage Road is a shell surfaced road. If the right-of-way were located at point B its use would entail traveling along Lake Heritage Road for about two miles before reaching Highway 23. Thus, the evidence shows that the location of the servitude at point B would be least injurious to defendant, while location at point B would not be equally convenient to plaintiff as would be location at point A. There is a dispute as to whether the Lake Hermitage Road is a public road or not, with the trial judge finding that it was formerly a private road but was now a public road, made public by use and maintained by the Parish of Plaquemines. While there is no evidence in the record to support this finding, for our purposes here, we will assume that Lake Hermitage Road is a public road in the implementation of the Civil Code articles governing the rights of the parties.

The trial judge decided the case in favor of defend-ant on the basis of LSA-C.C. Art. 700, which provides as follows:

"The owner of the estate, which is surrounded

by other lands, has no right to exact the right of passage from which of his neighbors he chooses.

"The passage shall be generally taken on the side where the distance is the shortest from the inclosed estate to the public road.

"Nevertheless, it shall be fixed in the place the least injurious to the person on whose estate the passage is granted."

Plaintiff contends that C.C. Art. 777 governs the situation:

"The owner of the estate which owes the servitude can do nothing tending to diminish its use, or to make it more inconvenient.

"Thus he can not change the condition of the premises, nor transfer the exercise of the servitude to a place different from that on which it was assigned in the first instance.

"Yet if this primative assignment has become more burdensome to the owner of the estate which owes the servitude, or if he is thereby prevented from making advantageous repairs

> on his estate, he may offer the owner of the other estate a place equally convenient for the exercise of his rights, and the owner of the estate to which the servitude is due can not refuse it."

The nub of the controversy is whether the servitude was already established at point A, in which case plaintiff is entitled to maintenance and recognition of the servitude at that point since point B is not "a place equally convenient" as required by Art. 777, or the location has not been established so that defendant is entitled to fix the servitude at point B, which from its point of view is "the place least injurious" as provided by Art. 700.

The servitude of passage being a discontinuous servitude, Art. 727, can be established only by title and cannot be acquired by possession itself. Art. 766.

The problem here is that plaintiff's general right of ingress and egress equivalent to a servitude of passage was established by title but the location was not. Plaintiff relies upon the following articles of the Civil Code to support its position that it did acquire the servitude at point A:

"Art 779. If the *manner in which the servitude is to be used* is uncertain, *as if the place necessary for the exercise of the right of passage* is not designated in the title, the owner of the estate which owes the servitude is bound to fix the place where he wishes it to be exercised." (emphasis supplied)

"Art 780. If the title by which a passage is granted does not designate its breadth, *nor the manner in which it is to be used*, whether on foot, or horseback, or with carriages, the use which the person to whom the servitude is granted previously made of it will serve to interpret the title.

"If there was no such use made of it before, the probable intention of the parties must be considered, and the purpose for which the passage is granted.

"If these circumstances can afford no light, it must be decided in favor of the land which owes the servitude, and a foot passage must be conceded eight feet wide, where it is straight, and ten feet wide where it turns." (emphasis supplied)

[1] As can be seen, where the title does not designate "the manner in which [the servitude] is to be used" the use previously made of it will serve to interpret the title. The words "manner in which it is to be used" in Art. 780 must include the meaning which is given to the same words in Art. 779, i.e., "the place necessary for the exercise of the right of passage." We find nothing to suggest that these words do not have the same meaning in both articles. Furthermore, the jurisprudence indicates that the place for the exercise of the servitude is to be determined by the use previously made of it.

In *Burga v. Stoutz,* 174 La. 586, 141 So. 67, plaintiff was awarded an injunction against defendant from closing off a right of passage from plaintiff's property across defendant's where plaintiff's title included "the privilege of using the paved driveway in the rear of the property hereinabove described, which paved driveway is part of Lot 'B' belonging to the vendors. . ." Defendant attacked the title on the ground that it was insufficient in that it did not state the length or the width of same. The Court said:

> "This particular ground of attack is without merit, since the paved runways are located as physical objects on the surface of lot'B', the property of defendnat, as shown by

> photographs filed in evidence, and the length and width of same are easily ascertainable. That which can be made certain is considered in law a certain."

In *J.C. Trahan, Drilling Contractor, Inc. v. Younger,* 169 So.2d 15 (La. App. 2nd Cir. 1964) plaintiff's right-of-way grants were attacked on the grounds that they did not sufficiently describe the servitude as to its width, length and points of traverse. The instruments conferred upon the grantee "the right-of-way to lay, maintain and operate a pipeline over, under, across and through the following described property. . ." There followed a description of the property to be burdened with the servitude. Pror to the institution of the suit plaintiff had constructed and operated the subject pipeline through the property. The court applied the reasoning of *Burgas v. Stoutz* recognizing the distinction in that case stemming from the fact that there was a descriptive platt annexed to the deed granting the right-of-way, but held:

> ". . . Regardless of the failure to describe the exact location of the servitude at the time of the grants this failure was remedied by the construction of the pipeline. It follows that that which was uncertain has been made certain."

[2] We conclude that plaintiff is entitled to have his servitude at point A recognized and maintained.

Accordingly, the judgment appealed from is amended to delete the description of the right-of-way at point B and to substitute therefor a description at point A. Because the judgment of the trial court incorporated a legal description based upon an engineering survey dated April 9, 1975, which described in detail the dimensions and location of the right-of-way at point B, and since no comparable description and survey are available to us for a description of the servitude at point A, the case must be remanded to District Court in order to incorporate into a final judgment a proper description of the right-of-way at point A. In all other respects the judgment of the trial court is affirmed. Defendant is to pay the costs of this appeal.

AMENDED AND REMANDED.

LUGENBUHL, LARZELERE & ELLEFSON
Of Counsel

VANCE E. ELLEFSON
600 Carondelet Street
Suite 602, Central Plaza
New Orleans, La. 70130
Telephone: (504)
523-6066
Attorney for Savare
DeFelice